PUBLIC PROSECUTOR

v.

LIM AH HAI

HIGH COURT MALAYA, KUALA LUMPUR
VISU SINNADURAI J
[CRIMINAL TRIAL NO. 47-64-90]
22 JUNE 1992

CRIMINAL PROCEDURE: *Administration of caution - Whether legal requirements adhered to - Section 37A Dangerous Drugs Act 1952 & s. 113 Criminal Procedure Code - Admissibility of accused's statements - Trial-within-a-trial.*

EVIDENCE: *Trafficking in dangerous drugs - Whether statutory presumptions as to possession and trafficking apply - Raising a prima facie case - Rebuttal - Onus on defence - Presenting a plausible defence - Defence choosing not to call witnesses to substantiate accused's testimony - Whether adverse inference should be drawn against accused.*

WORDS AND PHRASES: *Definition of "possession" under Dangerous Drugs Act 1952.*

The accused had been charged with trafficking in dangerous drugs. The accused did not tender any evidence to challenge the finding of the chemist that the drugs were "dangerous drugs "nor did he imply in any way that the chain of evidence as regards the exhibits from the time of his arrest till trial had been broken. The defence story revolved around facts suggesting that he was an innocent carrier who had been unwittingly used by acquaintances into carrying the offensive substance. However he failed to call the two acquaintances as witnesses in his defence.

The accused also denied that a caution had been administered to him, or, even if there had been one, it had not been in accordance with the requirements of the law. He proceeded to challenge the admissibility of certain statements he had made in reply to questions posed by the police officers.

In his judgment, the learned Judge first addressed the issue of the "caution", explaining the necessity for the safeguards imposed by the law and his reasons for his finding at the conclusion of the trial-within-the-trial. Thereafter he examined the application of the statutory presumptions to the facts and the evidential burdens on prosecution and defence.

Held:

[1] The statements made by the accused were made involuntarily and were inadmissible for want of evidence indicating that the legal requirements governing the admissibility of cautions had not been complied with. The purported caution had not been reduced into writing, no details on it had been furnished in the police report, it had not been ascertained if the caution had been understood in the language in which it was interpreted to the accused, the accused had handcuffs on during questioning, the rank of the police officer to whom the answers were directed was unclear and there was a likelihood of bias due to the fact that the alleged caution had been administered by an officer involved in the raid.

[2] As the defence had not challenged the chain of evidence and the finding of the chemist and as their case was mainly based on the statutory presumptions operating on the facts, a *prima facie* case was found to have been established and the accused was called on to enter his defence.

[3] The accused had explained the circumstances leading to his being found with the bag containing the drugs. Further, there was no evidence indicating that the bag or its contents were his and no finger printing had been done to prove otherwise. He had moreover not attempted escape when confronted by police and had behaved creditably then and in Court. In totality the defence case was plausible. On a balance of probabilities, the defence had raised reasonable doubts and successfully rebutted the presumption under s. 37(d) of knowledge and possession. Consequently, it follows that the presumption as to trafficking need not be considered.

[4] The Court refuses to draw an adverse inference against the defence in not calling the two witnesses as it is not the duty of the Court to speculate on the course embarked on by the accused in presenting his defence. The accused was at liberty to choose any particular course of defence open to him.

[Accused acquitted and discharged.]

Cases referred to:
DPP v. Ping Lin [1976] AC 574 ***(foll)***
Haw Tua Tau v. PP [1981] CLJ (Rep) 11 ***(foll)***
A. Ragunathan v. PP [1982] CLJ (Rep) 63 ***(foll)***
Mohd. Radhi bin Yaakob v. PP [1991] 1 CLJ (Rep) 311 ***(foll)***
Pang Chee Meng v. PP [1992] 1 CLJ (Rep) 265 ***(foll)***
PP v. Kau Joo Huat [1988] 1 CLJ (Rep) 258 ***(foll)***
PP v. Lai Ah Bee [1974] 2 MLJ 74 ***(foll)***
PP v. Khoo Boo Hock [1990] 2 CLJ (Rep) 716 ***(foll)***
Illian & Anor. v. PP [1988] 1 SCR 203 ***(cit)***
Choo Chang Teik v. PP [1991] 1 CLJ (Rep) 54 ***(cit)***
PP v. Goh Yeong Hock & Anor. [1988] 2 CLJ (Rep) 240 ***(cit)***
PP v. Arjan Singh [1989] 2 CLJ (Rep) 297 ***(cit)***
Chee Chiew Heong v. PP [1981] CLJ (Rep) 122 ***(cit)***
PP v. Kang Ho Soh [1991] 3 CLJ (Rep) 557 ***(cit)***

Legislation referred to:
Criminal Procedure Code, ss. 113, 180
Dangerous Drugs Act 1952, ss. 37(d), 37A

For the accused - Kattar Singh (Gurbachan Singh with him)
For the prosecution - Idrus bin Harun, DPP

JUDGMENT

Visu Sinnadurai J:

On 6 March 1990, at about 6a.m in the morning, a police party led by Inspector Roslan bin Mohamed, having earlier received certain information, went to the Puduraya Bus Station. At the material time, the accused, who had been under surveillance, was seen by the police sitting by a fire hydrant in front of the 7-Eleven shop. He had a bag with him. Where exactly the accused kept the bag was in dispute. The prosecution asserted that it was between his legs, whilst the defence alleged it was by his side. The prosecution's story is that the police approached the accused, identified themselves, and searched the bag which the accused had with him. On finding three packets of what was suspected to be dangerous drugs (heroin) in the bag, the police arrested him.

The accused was then handcuffed and a caution was administered by Inspector Roslan in Bahasa Malaysia. Inspector Roslan sought the assistance of another police officer, Detective Corporal Ng to interpret the caution. Subsequently, Inspector Roslan asked the accused certain

questions and the accused was said to have given certain answers. The defence objected to these answers being admitted on the ground that no proper caution in compliance with s. 37A of the Dangerous Drugs Act had been administered or that the caution statement was made involuntarily. After a trial-within-a-trial was conducted, this Court ruled that the statements made by the accused were inadmissible. The following oral decision on the trial-within-a-trial was given by the Court.

Trial-Within-a-Trial

The crucial question to ask in each case where the admissibility of statements made by accused person is in question is whether the legal requirements for such admissibility have been complied with. The law clearly attempts to strike a compromise on this matter; on the one hand, the police, and on the other, the arrested person. The police should be in a position to obtain sufficient evidence against an accused person so that an appropriate charge may be framed against him. As is the case in most situations, if all evidence during an investigation were to be excluded by law, the possibility of the police obtaining sufficient evidence to prosecute an offender would be minimal, thus frustrating the responsibility of the police to enforce law and order. On the other hand, of course, the law recognises that an accused, person should also be protected. Therefore certain restrictions and safeguards are imposed as to the admissibility of statements made by an accused person. These safeguards are provided for in s. 37A of the Dangerous Drugs Act or s. 113 of the Criminal Procedure Code.

Now what are these safeguards? Section 37A of the DDA (and s. 113 of the CPC) provides that any statement made by an accused person which is freely (or as is often said voluntarily) given and the consequences of so making a statement are made known to the accused person, is admissible. It is for this reason that a caution has to be administered so that the accused would know of the consequences of making the statement. One major reason why such statements made by an accused person are held to be admissible is that whatever the accused person may say may also be used in his defence at his trial. The accused may of course choose to remain silent. Likewise what the accused person says may also be used by the prosecution at the trial. It is therefore vital that the accused person fully understands and appreciates the consequences of making such statements.

I should perhaps also emphasise that the determination of the question as to whether the statements sought to be admitted appears to the Court to be voluntarily made depends on the facts of each case. It is therefore a question of fact which the Court in each case has to determine. In this regard precedents whilst useful in providing guidance cannot be strictly adhered to: see *DPP v. Ping Lin* [1976] AC 574.

In the present case, the accused was sitting on a fire hydrant at about 6.30 a.m. opposite the Puduraya Bus Station. Obviously he was waiting for someone to meet him. He was quite oblivious to the fact that he was already being watched by the police.

A police team of no less than eight police, personnel suddenly appeared before him. He was told that he was under arrest and immediately his bag was searched. The police discovered the drugs which was concealed in the bag, all three packets being wrapped in T-shirts. Inspector Roslan almost immediately administered a caution. The caution was said to be interpreted by D/C Ng. As a consequence, the accused was alleged to have admitted to the existence of the other packages in the bag containing drugs. He was said to have even given the weight of each of the packages.

The question is whether these statements made by the accused are admissible under s. 37A of the Dangerous Drugs Act.

The defence has raised a number of objections. Those meriting consideration are as follows:

(a) That no caution was given at all as alleged by the police as there was no evidence that a proper caution was administered to the accused. The caution was not reduced in writing; there was no other written documents signifying that the accused acknowledged the caution, like a signature; that even in the police report made by Inspector Roslan, no details as to the administration of the caution was furnished, not even the fact that the purported caution was translated by D/C Ng;

(b) Even if there was a caution administered, it was one which did not comply with the requirements of the law: there was no evidence to suggest that D/C Ng did interpret the caution, except for what Inspector Roslan and D/C Ng themselves had said. There was no evidence that even if the caution was interpreted by D/C Ng, the accused understood the implication and consequences of the caution. D/C Ng merely said that he interpreted the caution in Hokkien. But there was no indication at all whether the accused in fact understood Hokkien;

(c) The accused was already handcuffed during the time when the caution was said to have been administered. And this was so during the period that he was being questioned, thus implying that the accused was under threat when he made the statements;

(d) It was not clearly established that Inspector Roslan was at the material date holding the rank of an Inspector as required by s. 37A of the DDA;

(e) That the purported caution, if there was one, was administered not by an independent officer, like the investigating officer, but by an officer who was personally involved in the raid, that is Inspector Roslan who was the leader of the raiding party assisted by D/C Ng who was also a member of the raiding team. There was therefore, a likelihood of bias present in the instant case.

Considering the totality of the evidence and the relevant law and the cases cited to me, this Court rules that in the light of the doubts existing in the present case as to the voluntariness of the statements made, the statements made by the accused were inadmissible.

Prosecution's Case

The prosecution, through its witnesses, especially Inspector Roslan, adduced evidence that in the bag which the accused was carrying was found three packets wrapped in three shirts, together with two other shirts and two pairs of trousers. No other items were found in the bag. The three packets were subsequently sent to the Chemistry Department and the Chemist who analysed the substance in each of the packets, Mr. Cheong Meow Kwoon, confirmed in evidence in Court that the substance was 158.36 grammes of heroin and 119.58 grammes of monoacetylmorphine as defined by the Dangerous Drugs Act. The Chemist's evidence in Court was not challenged by the defence. It should, perhaps also be pointed out at this stage, that the defence did not challenge any break in the chain of evidence relating to the exhibits. The prosecution, therefore, clearly established that the proper procedure relating to the exhibits were complied with from the time the exhibits were found in the bag of the accused until the time it was analysed by the Chemist and kept in safe custody by the police.

The prosecution's case against the accused was mainly based on the application of the relevant statutory presumptions under the Act.

At the end of the prosecution's case, this Court, after due consideration, was satisfied that the prosecution had established a *prima facie* case and in accordance with s. 180 of the Criminal Procedure Code, called on the accused to enter his defence: *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11 PC and *A. Ragunathan v. PP* [1982] CLJ (Rep) 63, followed.

The Defence

The accused elected to give evidence upon oath. His defence was that the bag did not belong to him and that it belonged to another called Ah Mai. The accused said that a few months before his arrest, he was staying with a friend in Penang called Too Kiah. During this time, he was unemployed as he had ceased working as a plumber. Too Kiah had introduced him to Ah Mai who had come to Penang from Kuala Lumpur. At a dinner arranged by Too Kiah on 14 March 1990, Ah Mai told the accused that if he came to Kuala Lumpur, he (Ah Mai) would be able to arrange for a job for the accused. Ah Mai gave the accused his telephone number so that he could contact Ah Mai when he arrived in Kuala Lumpur.

The day after the dinner, (that is, 15 March 1990) Ah Mai who was also staying in Too Kiah's house was returning to Kuala Lumpur. The accused then asked Ah Mai to bring the accused's clothes to Kuala Lumpur in two bags which the accused had packed. The accused said that he did not accompany Ah Mai back to Kuala Lumpur as he wanted to see his previous employer to obtain his wages which were still owing to him. That same afternoon, (15 March) after collecting his wages, together with Too Kiah he went to purchase his bus ticket for his journey to Kuala Lumpur. Prior to his departure to Kuala Lumpur, Too Kiah informed the accused that Ah Mai had inadvertently left his (Ah Mai's) bag behind in Too Kiah's house and asked the accused to take the bag to Ah Mai and deliver it to Ah Mai in Kuala Lumpur. The accused obliged. In evidence, the accused said that Too Kiah had told him that the bag only contained Ah Mai's clothes. It was this bag that was with the accused and that which contained the drugs when it was seized by the police on the date of the accused's arrest.

The accused told the Court that he did not keep any of his own personal items in it. The accused denied absolutely any knowledge of the contents of the bag. He further stated that on reaching the Puduraya Bus Station, he had telephoned Ah Mai and that Ah Mai had told him to wait at a particular spot until Ah Mai arrived to fetch him. It was whilst waiting for Ah Mai that the police arrested him.

The defence, in cross-examination of the prosecution witnesses, was able to establish that no other personal items or documents were found in the bag; no finger printing of the packets found in the bag was taken by the police and that the clothes in the bag did not conclusively belong to the accused.

The defence called no other witnesses.

The Law

It would appear that with the application of the statutory presumptions under the Dangerous Drugs Act, the task of the prosecution in drug trafficking offences under the Act is made less onerous. In cases such as the one before this Court the prosecution, leaving aside the technical aspects of the law relating to the analysis of the drugs by the Chemist and of the chain of evidence relating to the exhibits, need only show that:

(a) by the fact that the accused had custody and control over the bag, he is deemed to be in possession of the drugs in the bag;
(b) that as the weight of the drugs found was in excess of that prescribed by s. 37(da) of the Act, he is deemed to be trafficking the drugs.

Once this had been established, as a general rule, a *prima facie* case against the accused may be made out and it was then for the defence to show that the presumptions stated above had been rebutted.

The question therefore in each case is whether the defence has succeeded in adducing sufficient evidence to prove to the contrary so as to rebut the application of the presumptions. In so determining, it must be borne in mind that the onus cast on the defence in such cases is one of balance of probabilities. This principle of law was once again restated by the Supreme Court in the recent case of *Mohd. Radhi bin Yaakob v. PP* [1991] 1 CLJ (Rep) 311, where Mohamed Azmi SCJ in delivering the judgment of the Supreme Court said:

> In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

See also the judgment of Abdul Hamid LP in *Pang Chee Meng v. PP* [1992] 1 CLJ (Rep) 265.

In the instant case, the defence therefore has to show that on the balance of probabilities, the two presumptions of possession and trafficking had been rebutted. In *Mohd Radhi's* case above, it was held by the Supreme Court that even if the defence failed to rebut the presumption of possession, the Court still had to consider whether the presumption of trafficking had been rebutted. The mere failure to rebut the presumption of possession did not mean that the defence had also failed in rebutting the presumption of trafficking. Mohd Azmi SCJ said:

> Whilst we could not agree with what the learned Judge had said earlier in his judgment that if the defence had succeeded in rebutting the presumption of possession under s. 37(d), there was no need to rebut the presumption of trafficking under s. 37(da), it did not follow that the presumption of trafficking would become irrebuttable merely because the defence had failed to rebut the presumption of possession. In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though the Court is satisfied on balance that the presumption of possession under s. 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

In so deciding, the Court needs to consider whether the defence's explanation as adduced by evidence in Court had now created a reasonable doubt as to his guilt. As Mohd Azmi SCJ said, in *Radhi's* case, above:

> To earn an acquittal, the Court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the Court to be convinced that the defence version is true, in which case the Court must order an acquittal. In appropriate cases it is also not wrong for the Court to conclude that the defence story is false or not convincing, but in that instance, the Court must not convict until it asks a further question, that even if the Court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of Judges rightly prefer to adopt straightaway the legally established 'reasonable doubt' test, rather than to delve in the 'believable and convincing' test before applying the 'reasonable doubt' test.

The Presumptions

(a) *Possession*

The meaning of the term 'possession' under the Dangerous Drugs Act has now been clearly clarified by the decision of the Supreme Court in *PP v. Kau Joo Huat* [1988] 1 CLJ (Rep) 258. The Supreme Court has now held that for purposes of possession, it need only be shown that

(a) the accused knew of the nature of the thing possessed; and

(b) that the accused was conscious of his possession of the thing.

It was clearly stated by the Supreme Court, that the earlier decisions which stated that the accused had to have the power of disposal of the thing possessed was not necessary for purposes of the Dangerous Drugs Act 1952.

It should, perhaps be also pointed out that mere knowledge by itself does not constitute possession: *PP v. Lai Ah Bee* [1974] 2 MLJ 74 and applied by Edgar Joseph Jr. in *PP v. Khoo Boo Hock* [1990] 2 CLJ (Rep) 716.

Application of the Law to the Facts

Did the accused, therefore have knowledge of the drugs in the instant case? The accused vehemently denied having any knowledge of the drugs. Do the facts of the case substantiate this denial? The bag was handed to him by Too Kiah for him to deliver it to Ah Mai, whom he had recently become acquainted with and who had already obliged him by a promise of a job in Kuala Lumpur. Ah Mai had already taken the accused's two bags to Kuala Lumpur. Too Kiah in whose house the accused was staying had requested the accused to take the bag to Ah Mai. Therefore, being obligated to both Too Kiah and Ah Mai, the accused had little choice but to carry the bag. Furthermore, he did admit that he made a cursory check on the contents of the bag but merely found clothes in it. (Inspector Roslan had also stated that when he first opened the bag he only could see the clothes and not the packets containing the drugs).

These facts alone may not be sufficient to rebut any knowledge of the drugs. Was there any other evidence in the police investigation to indicate to the contrary that the accused had knowledge of the drugs? As no finger printing was done by the police of the plastic packets, it is difficult to conclude that the accused did handle the drugs. The clothes in the bag were not established to belong to the accused. In the absence of such evidence, the defence story that it belonged to Ah Mai is plausible. One other factor which ought to be taken in consideration is the fact that on the morning of 16 March, when he was confronted by the police before his arrest, the accused did not resist arrest nor attempt to escape from the police. If he knew that the bag contained drugs would he not have attempted to run away? The accused had told the police of Too Kiah and the police had taken the accused to Penang for him to identify Too Kiah's house. However, as to why Too Kiah was not called as a witness remains speculative. Furthermore, watching the demeanour of the accused in Court whilst giving evidence, I was convinced that he was a truthful witness.

The prosecution has urged the Court to draw an adverse inference against the accused in not calling Too Kiah and Ah Mai as witnesses for the defence. I have not been unmindful of this omission. It is not the duty of the Court to speculate as to the reasons as to why these two persons were not called as witnesses: see observations of Abdul Hamid LP in *Pang Chee Meng*, above where the learned Lord President said:

> Whether the accused testifies or adopts other means is a matter of choice for him and Counsel. No adverse inferences can be drawn or seen to be drawn only because he exercised his liberty to choose any particular course.

Furthermore, I am reminded of the Supreme Court decision in *Illian & Anor. v. PP* [1988] 1 SCR 203 and of the caution given by the Supreme Court more recently in *Choo Chang Teik v. PP* [1991] 1 CLJ (Rep) 54 in drawing adverse inferences against an accused person in offences dealing with capital punishment. Mohd. Yusoff SCJ in delivering the judgment of the Supreme Court observed:

> We feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone is not sufficient to support a conviction of the appellant without some proof of the element of control.

Therefore in scrutinizing the evidence in its totality, there are reasonable doubts in my mind as to the accused's guilt as I am satisfied that the accused has, on a balance of probabilities, succeeded in rebutting the presumption under s. 37(d) of knowledge and consequently possession.

In reaching this conclusion, I have also considered several cases referred to me where the Courts had determined the circumstances under which a person in possession of a bag containing drugs was able to rebut the presumption of knowledge of the drugs in the bag. I realise that these cases are not precedents which I should be bound to follow, as I am fully aware that the decision reached in each one of them was based on the particular facts of the case. Nevertheless, they are helpful guides. They provide some assistance in determining the question of knowledge. If not anything else, these cases show that the mere fact that a person was in possession of a bag containing drugs does not by itself necessarily impute knowledge of the drugs on the person.

In *PP v. Goh Yeong Hock & Anor*. [1988] 2 CLJ (Rep) 240, KC Vohrah J acquitted both the accused who had control and custody of three bags containing heroin. The Court found that both the accused did not have knowledge of the heroin contained in the bags which they had checked in at the Subang International Airport. (A similar decision was reached by Shaik Daud J in a fact situation which was almost similar to the case decided by KC Vohrah J, referred to in KC Vohrah's judgment).

In *PP v. Arjan Singh* [1989] 2 CLJ (Rep) 297, Anuar J acquitted an accused person who was carrying for his friend a bag which was subsequently discovered to contain ganja, as he had no knowledge of the drugs in the bag. His Lordship said:

> From the evidence if it is true that the bag was given to the accused by Omar, he (the accused) would not know what was in the bag. He had therefore no knowledge of what he was carrying. He was merely carrying the bag for Omar. It is not unusual for a friend to carry a bag for another friend. ...Merely carrying something for someone else without knowing what he is carrying is not a crime. It is certainly not trafficking (at p. 299).

See also the decisions of Chan J in *Chee Chiew Heong v. PP* [1981] 1 CLJ (Rep) 122, and Shankar J in *PP v. Kang Ho Soh* [1991] 3 CLJ (Rep) 557.

b) *Trafficking:*

In the light of my finding that the accused had succeeded in rebutting the presumption of possession, there is no need for me to further consider the question as to whether the presumption of trafficking had also been rebutted: see *Mohd. Radhi's* case.

Conclusion

Having viewed the totality of the evidence, I am satisfied that on the balance of probabilities, the accused has rebutted the presumption under s. 37(d).

I therefore acquit and discharge the accused.

Also found at [1992] 3 CLJ 1733